In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES PLYWOOD AND CHEMICAL COMPANY,
PETITIONER,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-442

UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 46) and the oral decision of the district court (Pet. App. 33-42) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1976. The petition for a writ of certiorari was filed on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether when the EEOC consolidates a private charge and a Commission charge for purposes of investigation, enforcement of a private charge administrative

subpoena can be challenged on the basis of an alleged defect in the public charge deferral procedures.

2. Assuming that upon consolidation such a defect in the public charge would taint the private charge, whether the court below properly enforced an EEOC subpoena where the Commission initially failed to offer to defer to a local agency which had a policy and practice never to accept EEOC Commissioner's charges, and subsequently made a formal offer of deferral.

3. Whether enforcement should have been denied because the Commission's procedures authorize the same individual to recommend initiation of charges, to conciliate the charges and to file suit for violation of Section 707 of the Civil Rights Act.

STATEMENT

This case arises out of the consolidation of a private charge under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, with a preexisting Commissioner's charge under the same statute, for purposes of investigation only, pursuant to EEOC Notice N-916, §6(c) (Pet. App. 10). Petitioner seeks to challenge a subpoena issued pursuant to the private charge, on the basis of an alleged procedural defect in the Commission charge. Petitioner also argues that the combination of investigatory, conciliatory and charge-initiation functions in the same person violates Title VII.

On August 16, 1974, then Commission Chairman Powell issued a charge of pattern or practice of discrimination against petitioner under Sections 706 and 707 of Title VII, 42 U.S.C. 2000e-5 and 2000e-6 (Pet. App. 2). The EEOC notified the Maryland Commission on Human Relations of the Commissioner's charge on September 4, 1974, but did not state that the Maryland Commission

had 10 days within which to request a deferral as required by EEOC Notice N-916, §7 (Pet. App. 20). The EEOC commenced its investigation and several interviews were conducted during the month of September. However, a review of the Commissioner's charge file in October indicated that service of the charge had in fact been premature. In order to cure any possible defect in the September 4 offer, EEOC sent a second letter to the Maryland Commission on October 7, 1974, asking it to respond within 10 days if deferral was desired, even though the Maryland Commission had already informed the EEOC, on October 3, 1974, that it planned no action on the matter (Pet. App. 4-5).[1] The Maryland Commission formally declined the second offer of deferral on October 7, 1974 (Pet. App. 5-6).

On September 23, 1974, Edgar Crawley, a former employee of the petitioner, filed a private charge with the Maryland Commission on Human Relations. After the expiration of the 60-day statutory period of deferral specified by Section 706(c), the EEOC assumed jurisdiction. The EEOC gave the company notice of the charge on December 2, 1974 (Pet. App. 33). Petitioner raises no challenge to the procedures accompanying the processing of the private charge.

In December, under an internal directive, EEOC Notice N-916, §6(c) (Pet. App. 10), the Crawley charge was designated for processing together with the Commissioner's charge by the office of General Counsel. At various times several other related private charges were also designated for consolidation. Such consolidation is for processing only, each charge is handled individually, and individual determinations and findings are made (Pet. App. 41).

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[1]The Commission's letter of October 7 was hand delivered.

On December 6, 1974, the Commission served an administrative subpoena in the private charge case. Petitioner refused to comply and on March 26, 1975, the Commission filed this suit in the district court to enforce its subpoena (Pet. App. 33). Petitioner argued that the failure to send the appropriate offer of deferral on September 4 invalidated the investigation of the Commission charge notwithstanding the subsequent offer of deferral made on October 7. Claiming that this defect tainted the private charge subpoena as well, petitioner asked the district court to refuse to enforce the private charge subpoena because the "EEOC has violated its statutory mandate * * * with respect to the Commissioner's charge of August 21, 1974 * * * " (Pet. App. 14).

The district court, apparently assuming that any defect in the processing of the Commissioner's charge would also invalidate a subpoena under the private charge, first declined to enforce the subpoena on the ground that the statutorily required offer of deferral had not been made (Pet. App. 18-25). However, the court vacated that judgment upon receipt of an affidavit from the Executive Director of the Maryland Commission on Human Relations attesting to its long standing practice of never accepting an "offer of referral on an EEOC Commissioner's Charge" (Pet. App. 32). In the face of this established understanding, the court viewed petitioner's challenge as "hypertechnical" (Pet. App. 38). The court then directed enforcement of the subpoena, also overruling petitioner's contention that it was improper to assign investigative functions to an attorney in the General Counsel's office since "the EEOC is not an adjudicatory agency" (Pet. App. 33-42).

A stay pending appeal was denied by both the district court and the court of appeals. The court of appeals affirmed *per curiam* "for the reasons stated by the District Judge * * * * " (Pet. App. 46). The information

sought by the subpoena has been turned over to the EEOC which deems the company to have complied fully with the subpoena.[2]

ARGUMENT

1. Petitioner sought to prevent enforcement of an EEOC subpoena issued in a private charge case but did not, and does not now, deny the relevance of the private charge subpoena or allege any procedural defect in the notice procedures accompanying issuance of the private charge. Instead petitioner seizes upon an alleged procedural defect in the issuance of a Commission charge which was consolidated with the private charge only for processing and investigation purposes. No authority is cited, and we have found none, to support the proposition that consolidation of EEOC charges for processing makes each charge vulnerable to the procedural defects of every other consolidated charge. Such a rule would deter the efficient processing of related charges through consolidation — a procedure designed "to assure maximum use of the agency's resources and maximum benefit to the victims of unlawful discrimination" (Pet. App. 41).

There can be no doubt about the separate nature of the proceeding which generated the challenged subpoena. The subpoena was issued under the name of the private charge and, under standard Commission practice, the private charge proceeding at all times retained its

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[2]The case is not moot, however, since other private charges against petitioner are under investigation by the Commission and the same issues may be raised by the petitioner. *See, e.g., National Labor Relations Board* v. *Raytheon Co.*, 398 U.S. 25.

separate identity (Pet. App. 41). There can, accordingly, be no basis for a challenge to the private charge subpoena in any alleged failure to properly defer in the Commission charge case.[3]

2. In any event, the alleged defect in the deferral of the Commissioner's charge would not justify denial of enforcement of the subpoena. Unlike Section 706(c) which requires mandatory deferral of a private charge to a local agency, Section 706(d) merely provides the local agencies with the option to request referral. The EEOC is required to give notice of a Commissioner's charge, and *"upon request,"* to afford the agency a reasonable time to assert jurisdiction over the claim. The purpose of the offer of referral requirement is to provide the local agency with a meaningful opportunity to decide whether it will exercise its option to act under state or local laws to remedy the alleged practice. *See Crosslin* v. *Mountain States Telephone and Telegraph Co.* 422 F. 2d 1028 (C.A. 9), remanded with instructions, 400 U.S. 1004. However, as the affidavit from the Executive Director of the Maryland Commission on Human Relations demonstrates, there is a settled policy of that Commission never to accept EEOC referrals of such charges. Mr. Guillory stated (Pet. App. 32):

> It has been and continues to be a longstanding policy and practice of the MCHR to decline all EEOC offers of referral which involve a charge filed by a Commissioner of the EEOC. A primary reason for this MCHR policy and practice is the determination that MCHR's resources will be focused on charges received by MCHR, particularly those filed by MCHR Commissioners. I have reviewed the MCHR records and have found that MCHR has never accepted an EEOC offer of referral on an EEOC Commissioner's Charge. I am, and have been, aware that MCHR has the prerogative to accept an EEOC offer of referral of an EEOC Commissioner's Charge. The staff of MCHR is similarly aware of MCHR's right in this regard.

In the presence of a settled local agency policy to refuse all such referrals, notice of a Commission charge without an explicit offer of deferral does not violate the statute. As the district court said: "[R]equiring EEOC to tender a referral offer to the MCHR, within the technical requirements of the statute and regulations, would serve no practical purpose, nor is it required by the statute. * * * Title VII does not require the EEOC to perform a futile, hollow act" (Pet. App. 38).[4]

Even if it is assumed that the September 4 notice was deficient, that deficiency was cured by the second notice of October 7 which complied with all technical aspects of Section 706(d).[5] The fact that the Commission

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[3]The EEOC maintained throughout the proceedings below that the private charge subpoena could not be challenged on the basis of a defect in a public charge, especially one which occurred months before the consolidation for processing had even taken place (Pet. App. 27, n. 2).

[4]Petitioner complains that the policy of refusing referrals is not published and claims a violation of the Administrative Procedure Act (Pet. 20). However, the policy of refusal is a state policy, not an EEOC policy, and its non-public nature therefore is not a basis for challenging EEOC enforcement procedures.

[5]There is no merit in petitioner's suggestion (Pet. 5) that the charge was also required to be referred to the Baltimore Commission. EEOC Procedural Regulation 1601.12(g) (29 C.F.R.) provides:

> Where both State and local 706 Agencies exist, the Commission reserves the right to defer to the State 706 Agency only. However, if the Commission determines that it would best serve the purposes of the Act, it may defer to either or both State and local 706 Agencies.

had conducted three investigatory interviews between the two notices should not forever deprive the Commission of the authority to investigate a serious charge which had not progressed beyond the tentative initial stages of investigation. No purpose of the Commission, the State of Maryland, or even of the petitioner, would be served by dismissing the Commissioner's charge and requiring a new one. Petitioner argues that acceptance of the referral by the states would help alleviate EEOC backlogs. However, issuance of a new charge will not affect the policy of the Maryland Commission to refuse all Commission charge referrals. Petitioner admits "Section 706(d) obviously does not require the State agency to accept the offer of referral * * * " (Pet. 20-21).

The decision below is not in conflict with cases cited by petitioner (Pet. 13-14, 19) which hold that, where the Commission has failed to defer to a state agency, the district court may retain jurisdiction for a period sufficient to accomplish the deferral. The cases uniformly indicate that non-deferral may be cured even if the Commission has acted in the interim.[6] The other decision relied on, *Equal Employment Opportunity Commission* v. *Hickey-Mitchell Co.*, 507 F. 2d 944 (C.A. 8), affirming the dismissal without prejudice of a Commission suit for its failure to send a notice required by its regulation, was based on a conclusion that the absence of notice prejudiced the company. Here, no prejudice was shown, and any possible defect was cured by the second notice.

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[6] *Crosslin* v. *Mountain States Telephone & Telegraph Co.*, 422 F. 2d 1028 (C.A. 9), vacated and remanded with instructions, 400 U.S. 1004; *Motorola, Inc.* v. *Equal Employment Opportunity Commission*, 460 F. 2d 1245 (C.A. 9); *Equal Employment Opportunity Commission* v. *Wah Chang Albany Corp.*, 499 F. 2d 187 (C.A. 9); *Mitchell* v. *Mid-Continent Spring Company of Kentucky*, 466 F. 2d 24 (C.A. 6).

3. The procedure outlined in EEOC Notice N-916, §7 (Pet. App. 11-12), for the processing of Section 707 "pattern or practice" charges by an individual in the office of General Counsel, neither contravenes the statute nor denies petitioners due process (Pet. App. 38-40). Since the Commission is not an adjudicatory body,[7] there is no commingling of prosecutorial and adjudicatory functions. The ultimate decisions as to reasonable cause and, if necessary, as to instituting suit are made by the Commission. Whether a charge is investigated by a Commission investigator or a Commission attorney is merely a matter of internal management as to the use of Commission personnel.

The legislative history is not to the contrary. The portion relied on by petitioner (Pet. 25) occurred during discussion of an amendment to a bill (S. 2515, 92d Cong., 1st Sess. (1971)) which would have given the EEOC quasi-judicial powers to hear complaints and issue cease and desist orders. A number of congressmen felt that these quasi-judicial powers required a separation of the Commission's prosecutorial and decisional functions by removing the General Counsel from the investigation and conciliation process until a judicial complaint had been issued. Senator Williams' remark quoted by petitioner (Pet. 25) was made in support of the amendment (No. 797) separating the two functions.[8] Since the 1972 amend-

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[7] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-45; *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 799. *See also, Hannah* v. *Larche*, 363 U.S. 420, 442; *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 598-599.

[8] As enacted in 1972, Section 705(b) does not contain the following language which was proposed by Amendment No. 797 to S. 2515, in order to ensure the separation of functions:

> The General Counsel shall have responsibility for the issuance of complaints, the prosecution of such complaints before the Commission * * * . In accordance with the provisions of Section

ments to Title VII, as enacted, did not confer the proposed quasi-judicial functions on the Commission, the quoted remarks have no relevance to the present statute.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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554(d) of title 5, United States Code, no employee or agent of the Commission may engage in the performance of prosecutorial functions for the Commission in a case or any factually related case, and also participate or advise in the decision, except as a witness in public proceedings * * *.